Supreme Court, U.S.
FILED
JUL 18 2005
OFFICE OF THE CLERK

No. 04-1152

In The
Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.,

Petitioner,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF ADM. CHARLES S. ABBOT, LT. GEN DANIEL W. CHRISTMAN, GEN. WESLEY K. CLARK, ADM. ARCHIE CLEMINS, ET AL. IN SUPPORT OF PETITIONER

(The complete list of amici is on the inside cover)

JOE R. REEDER
PHILIP R. SELLINGER
JOHN P. EINWECHTER
OF COUNSEL
Greenberg Traurig
800 Connecticut Ave. N.W.
Washington, DC 20006
(202) 331-3125

MARTIN S. KAUFMAN*
* *COUNSEL OF RECORD*
Atlantic Legal Foundation
60 East 42nd Street
New York, NY 10165
(212) 867-3322

Counsel for Amicus Curiae

July 2005

COMPLETE LIST OF AMICI

Admiral Charles S. Abbot
Lieutenant General Daniel W. Christman
General Wesley K. Clark
Admiral Archie Clemins
Lieutenant General Lawrence P. Farrell
General Ronald R. Fogelman
General Ronald H. Griffith
General William H. Hartzog
General Joseph P. Hoar
Admiral Gregory Johnson
General Paul X. (P.X.) Kelley
General Paul J. Kern
General Carl E. Mundy, Jr.
Lieutenant General Tad J. Oelstrom
General Glenn K. Otis
General J. H. Binford Peay III
Honorable William J. Perry
Admiral Joseph W. Prueher
Honorable Joe R. Reeder
General Robert W. RisCassi
Honorable James R. Schlesinger
General John M.D. Shalikashvili
General Hugh Shelton
General Eric K. Shinseki
Lieutenant General Theodore G. Stroup, Jr.
General Gordon R. Sullivan
General John H. Tilelli
Lieutenant General Frederick E. Vollrath
General Anthony Zinni

QUESTION PRESENTED

The question presented is whether the Court of Appeals erred in holding that the Solomon Amendment's equal access condition on federal funding likely violates the First Amendment to the Constitution and in directing a preliminary injunction to be issued against its enforcement.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Donald H. Rumsfeld, Margaret Spellings, Elaine Chao, Michael O. Leavitt, Norman Y. Mineta, and Michael Chertoff.

Respondents are Forum for Academic and Institutional Rights, Society of American Law Teachers, Coalition for Equality, Rutgers Gay and Lesbian Caucus, Pam Nickisher, Leslie Fischer, Michael Blauschild, and Erwin Chemerinsky.

TABLE OF CONTENTS

Page

Question Presented I

Parties to the Proceeding Below I

Interest of *Amici* 2

Constitutional and Statutory Provisions Involved 7

Statement 7

Summary of Argument 13

ARGUMENT 15

I. THE GOVERNMENT'S COMPELLING NATIONAL SECURITY INTEREST IN AN EDUCATED AND CAPABLE OFFICER CORPS REQUIRES THE ABILITY TO RECRUIT ON CAMPUS 15

II. THE COURT OF APPEALS' CONSTITUTIONAL ANALYSIS IS FUNDAMENTALLY FLAWED 20

A. The Solomon Amendment Does Not Interfere with Expressive Association and Does Not Compel Speech 21

TABLE OF CONTENTS (cont'd)

1. The Solomon Amendment Does Not Impair a School's Right to Expressive Association 21

2. The Court of Appeals' Compelled Association Analysis Is Flawed 24

3. The Solomon Amendment Does Not Implicate the Compelled Speech Doctrine 25

B. The Solomon Amendment is Valid Under "Intermediate Scrutiny" Standards 27

Conclusion 30

TABLE OF AUTHORITIES

Page

Cases

Aptheker v. Secretary of State, 378 U.S. 500 (1964) 15

Boy Scouts of Am. v. Dale,
530 U.S. 640 (2000) 21, 22, 24, n.16

City of Dallas v. Stanglin, 490 U.S. 19 (1989) 27, n.19

Chappell v. Wallace, 462 U.S. 296 (1988) 15

Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004) ..... *passim*

Gilligan v. Morgan, 413 U.S. 1 (1973) 14, 16

Glickman v. Wileman Bros. & Elliott, Inc.,
521 U.S. 457 (1997) 25

Goldman v. Weinberger, 475 U.S. 503 (1986) 29

Haig v. Agee, 453 U.S. 280 (1981) 15

Healy v. James, 408 U.S. 169 (1972) 24, n.18

Holmes v. California Army Nat. Guard,
124 F.3d 1126 (9th Cir. 1997),
reh'g en banc denied, 155 F.3d 1049 (9th Cir. 1998) 10, n.5

Johanns v. Livestock Marketing Board, ___ U.S. ___,
125 S.Ct. 2055 (2005) 27

TABLE OF AUTHORITIES (cont'd)

Page

Cases (cont'd)

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 24, n.16

Orloff v. Willoughby, 345 U.S. 83 (1953) 16

Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) 26

Richenberg v. Perry, 73 F.3d 172 (8th Cir. 1995) 10, n.5

Rostker v. Goldberg, 453 U.S. 57 (1981) 16

Thomasson v. Perry, 80 F.3d 915 (4th Cir.) (*en banc*), *cert. denied*, 519 U.S. 948 (1996) 10, n.5

Thorne v. United States Dept. of Defense, 139 F.3d 893 (4th Cir. 1998) 10, n.5

United States v. Albertini, 472 U.S. 675 (1985) 28

United States v. O'Brien, 391 U.S. 367 (1968) 11, 13, 27, 28

TABLE OF AUTHORITIES (cont'd)

Page

Constitution and Statutes

U.S. Const. Art. I, § 8, Cl. 12 7

Armed forces Voluntary Recruitment Act of 1945,
ch. 393, § 2, 59 Stat. 538 10 U.S.C. 503(a)(1) 7

10 U.S.C. § 654(d) .....

National Defense Authorization Act for Fiscal Year 1995,
Pub. L. No. 103-337, Div. A, Tit. V, § 558, 108 Stat. 2776 ... 8

Omnibus Consolidated Appropriations Act of 1997,
Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-271
(the"Solomon Amendment), codified at 10 U.S.C. § 983 . *passim*

Ronald W. Reagan National Defense Authorization Act
for Fiscal Year 2005, Pub. L. No. 108-375, § 552,
118 Stat. 1811 ..... 17, n.10

TABLE OF AUTHORITIES (cont'd)

Page

Miscellaneous

141 Cong. Rec. 595 (1995) 16

142 Cong. Rec. 12,712 (1996) 16, n.9

142 Cong. Rec. 16,860 (1996) 16, n.9

H.R. Rep. No. 443, 108th Cong., 2d Sess. Pt. 1, at 3-4 (2004) .. 18

Department of Defense Budget at
http://dod.millcomptroller/defbudget/
fy2006/fy2006_overview.pdf ..... 19, n.13 and Appendix

No. 04-1152

In The
Supreme Court of the United States

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, *ET AL.*,

Petitioner,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF *AMICUS CURIAE* OF ADM. CHARLES S. ABBOT, LT. GEN DANIEL W. CHRISTMAN, GEN. WESLEY K. CLARK, ADM. ARCHIE CLEMINS, *ET AL.* IN SUPPORT OF PETITIONERS

The top-ranking former senior U.S. military officers and civilian Department of Defense officials listed below respectfully submit this brief as *amici curiae* in support of the petitioners.[1] *Amici*

[1] Pursuant to Rule 37, the parties have consented to the filing of this brief; their letters of consent are on file with the Clerk of the Court. In accordance with Rule 37.6, amici state that no (continued...)

believe that access to college and university campuses is essential to effectuate Congress' constitutionally mandated duty to "raise and support" a military, and that on-campus recruiting does not interfere with the First Amendment rights of faculty or students to freedom of speech or association. *Amici* therefore urge reversal of the decision of the United State Court of Appeals for the Third Circuit.

INTEREST OF *AMICI*

Amici are former top-ranking officers and civilian leaders of the United States Army, Navy, Air Force, and Marine Corps, and the Department of Defense who are deeply interested in this case and its impact on the quality of our nation's officer corps and the military's ability to fulfill its vital missions. *Amici*'s concerns are informed by decades of experience and accomplishment at the very highest positions in our nation's military leadership. They submit this brief to emphasize the critical role played by on-campus recruiting in meeting the personnel requirements of an all-volunteer military. A brief summary of their most recent positions follows:

Admiral Charles S. Abbot, retired 4-star, Deputy Commander, European Command (1998-2000), and Commander, U.S. 6th Fleet (1996-98).

---

[1](...continued)
counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

Lieutenant General Daniel W. Christman, retired 3-star, Superintendent of the U.S. Military Academy at West Point (1996-2001).

General Wesley K. Clark, retired 4-star, Supreme Allied Commander, Europe (1997-2000), and Commander in Chief, U.S. Southern Command (1996-97).

Admiral Archie Clemins, retired 4-star, Commander in Chief, U.S. Pacific Fleet (1996-99).

Lieutenant General Lawrence P. Farrell, retired 3-star, Deputy Chief of Staff, Plans and Programs U.S. Air Force (1997-98), and Vice Commander Air Force Material Command (1995-97).

General Ronald R. Fogelman, retired 4-star, Air Force Chief of Staff (1994-97) with overall responsibility for organizing, training and leading the 750,000 active duty, Guard, Reserve and civilian members, and Commander in Chief of U.S. Transcom (1992-94).

General Ronald H. Griffith, retired 4-star, Army Vice Chief of Staff (1995-97), Army Inspector General (1991-95), and Commanding General, 1st Armored Division (1989-91).

General William W. Hartzog, retired 4-star, Commanding General Army Training and Doctrine Command (1994-98), Deputy Commanding General, Atlantic Command (1993-94), and Commanding General, 1st Infantry Division (1991-93).

General Joseph P. Hoar, retired Marine 4-star, Commander in Chief, U.S. Central Command (1991-94).

Admiral Gregory Johnson, retired 4-star, Commander, Naval Forces Europe and Commander, Allied Forces Southern Europe (2001-2004), Commander U.S. Sixth Flee, and Commander Allied Striking and Support Forces Southern Europe (2000-2001).

General P. X. Kelley, retired 4-star, 28th Commandant of the U.S. Marine Corps (1983-87), with overall responsibility for organizing, training and leading the Corps.

General Paul J. Kern, retired 4-star, Commanding General, Army Material Command (2001-04), Senior Advisor for Army Research, Development, and Acquisition (1997-2001), and Commander, 4th Infantry Division (1996-97).

General Carl E. Mundy, Jr., retired 4-star, 30th Commandant of the U.S. Marine Corps (1991-95),with overall responsibility for organizing, training and leading the Corps, and Marine Corps Director of Personnel Procurement.

Lieutenant General Tad J. Oelstrom, retired 3-star, Superintendent, U.S. Air Force Academy (1997-2000), and currently Director, National Security Program, Kennedy School of Government, Harvard University.

General Glenn K. Otis, retired 4-star, Commander in Chief, U.S. Army Europe, and concurrently Commander of NATO's Central Army Group (1983-88), and commander U. S. Army Training and Doctrine Command (1981-83).

General J. H. Binford Peay III, retired 4-star, Commander in Chief, U.S. Central Command (1994-97), Army Vice Chief of Staff (1993-94), and Commanding General, 101st Airborne Division (1989-91).

Honorable William J. Perry, 19th Secretary of Defense (1994-97), Deputy Secretary of Defense (1993-94) and Under Secretary of Defense for Research and Engineering (1977-81), and currently a Professor of Engineering at Stanford University.

Admiral Joseph W. Prueher, retired 4-star, Commander in Chief, U.S. Pacific Command (1996-99), Commandant of Midshipmen, U.S. Naval Academy, and U.S. Ambassador to China (1999-2001).

Honorable Joe R. Reeder, 14th Under Secretary of the Army (1993-97), had oversight responsibility for admission criteria for the U. S. Military Academy and the ROTC programs at our nation's universities.

General Robert W. RisCassi, retired 4-star, Commander in Chief, United Nations Command and Combined Forces Command Republic of Korea (1990-93), Army Vice Chief of Staff (1988-90), and Commanding General, 9th Infantry Division (1983-85).

Honorable James R. Schlesinger, 12th Secretary of Defense (1973-74), Secretary of Energy (1977-79), Director, Central Intelligence Agency (1973). Dr. Schlesinger is a former member, Board of Overseers, Harvard College.

General John M.D. Shalikashvili, retired 4-star, 13th Chairman of the Joint Chiefs of Staff (1993-97), and Supreme Allied Commander, Europe (1992-92).

General Hugh Shelton, retired 4-star, 14th Chairman of Joint Chiefs of Staff (1997-2001), and Commander in Chief, U.S. Special Operations Command (1996-97).

General Eric K. Shinseki, retired 4-star, Army Chief of Staff (1999-2003), responsible for organizing, training, and leading over one million active duty, Guard, Reserve, and civilian members worldwide.

Lieutenant General Theodore G. Stroup, Jr., retired 3-star, Deputy Chief of Staff for Personnel, U.S. Army (1994-96).

General Gordon R. Sullivan, retired 4-star, Army Chief of Staff (1991-95), responsible for organizing, training and leading over one million active duty, Guard, Reserve, and civilian members worldwide.

General John H. Tilelli, retired 4-star, Commander in Chief, United Nations Command and Combined Forces Command Republic of Korea (1996-99), Commanding General, U.S. Army Forces Command (1995-96), Army Vice Chief of Staff (1994-95), and Commanding General, 1st Cavalry Division during the Gulf War.

Lieutenant General Frederick E. Vollrath, retired 3-star, Deputy Chief of Staff for Personnel, U.S. Army (1996-98), currently vice president for human resources of a Fortune 150 corporation.

General Anthony Zinni, retired Marine 4-star, Commander in Chief, U.S. Central Command (1997-2001), and U.S. Special Peace Envoy to the Middle East (2002).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides that "Congress shall make no law * * * abridging the freedom of speech."

The Solomon Amendment, 10 U.S.C. 983, is set forth in the appendix to the petition for certiorari (Pet. App. 185a-188a).

STATEMENT OF THE CASE

Article I of the Constitution vests in Congress the power to "raise and support" military forces for the defense of the United States. U.S. Const. Art. I, § 8, Cl. 12.

Enlisting qualified men and women in the military is essential to raising a military force capable of defending the United States. *Amici* are certain that the Nation's defense depends upon the ability of the armed forces to attract men and women of the highest caliber, especially as weapons systems, combat and strategic intelligence, communications, weapons and materiel development, logistics, and even personnel management have become increasingly sophisticated and therefore dependent not only on the latest technological developments but also on the intelligence, education and specialized knowledge of military personnel.

For several decades, and currently, the United States military has been an all volunteer force. To fulfill the military's personnel requirements, federal law requires the armed forces to "conduct intensive recruiting campaigns" to encourage military enlistments. 10 U.S.C. 503(a)(1) (codifying Armed Forces Voluntary Recruitment Act of 1945, ch. 393, § 2, 59 Stat. 538). As the requirements of military service have become increasingly

complex, the military has placed corresponding emphasis on recruiting students from colleges and universities.

Because some colleges and universities have restricted campus recruiting by the military, in 1994 Congress enacted legislation that directed the Department of Defense to withhold funds from any institution of higher education that denied military recruiters access to campuses and students. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, Div. A, Tit. V, § 558, 108 Stat. 2776. In 1997 Congress amended the law by adding several additional federal agencies similarly constrained. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-271, called the "Solomon Amendment" after the Member of Congress who originally introduced it, codified, as amended, at 10 U.S.C. § 983.

The Solomon Amendment, 10 U.S.C. 983(b)(1), requires that certain specified funds[2] are not to be provided to any "institution of higher education," or a "subelement" of such an institution, that has "a policy or practice" that "either prohibits, or in effect prevents" military recruiters from gaining access to campuses or students "in a manner that is at least equal in quality

---

[2] The Act applies to funds provided by the Departments of Defense, Homeland Security, Health and Human Services, the Central Intelligence Agency, and other enumerated agencies. 10 U.S.C. § 983(d)(1). The Act does **not** apply to funds provided to educational institutions or individuals "solely for student financial assistance, related administrative costs, or costs associated with attendance." 10 U.S.C. § 983(d)(2) (emphasis added); funding of students through scholarships, loans and loan guarantees is not affected.

and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. 983(b)(1).[3,4]

The Solomon Amendment neither requires a minimum degree of access to military recruiters, nor does it mandate that colleges and universities provide equal access to military recruiters. Rather, it merely conditions eligibility for certain federal funds upon the granting of equal access to military. In other words, an institution cannot both deny equal access to military recruiters and receive the specified types of federal funds.

---

[3] The Solomon Amendment currently provides as follows: 167 (b) Denial of funds for preventing military recruiting on campus.--No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents-- (1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or (2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution): (A) Names, addresses, and telephone listings. (B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student. 10 U.S.C. § 983(b).

[4] The Solomon Amendment applies to all institutions of higher education except those with "a longstanding policy of pacifism based on historical religious affiliation." 10 U.S.C. § 983(c)(2).

In 1990 the American Association of Law Schools (AALS) voted to include sexual orientation as a "protected category." Thus, virtually every law school now has a policy that states in substance:

> [The] School of Law is committed to a policy of equal opportunity for all students and graduates. The Career Services facilities of this school shall not be available to those employers who discriminate on the grounds of race, color, religion, national origin, sex, handicap or disability, age, or sexual orientation . . . .Before using any of the Career Services interviewing facilities of this school, an employer shall be required to submit a signed statement certifying that its practices conform to this policy.

See Forum for Academic and Institutional Rights v. Rumsfeld, 390 F.3d 219, 225 (3d Cir. 2004) (hereafter "*FAIR*"). AALS also takes the position that the U.S. Armed Forces, in complying with an Act of Congress relating to the discipline of military personnel, discriminates on the basis of sexual orientation.[5]

---

[5] In 1993 Congress enacted the "Don't Ask, Don't Tell" policy, codified at 10 U.S.C. § 654(b). That policy had never been found by a federal appellate court to be an unconstitutional abridgement of individuals' rights. *See, e.g. Richenberg v. Perry*, 73 F.3d 172 (8th Cir. 1995) ("We join six other circuits in concluding that the military may exclude those who engage in homosexual acts as defined in [10 U.S.C.] § 654(f)(3)(A).") *Accord Thomasson v. Perry*, 80 F.3d 915 (4th Cir.) (*en banc*), *cert. denied*, 519 U.S. 948 (1996); *Thorne v. United States Dept. of Defense*, 139 F.3d 893 (4th Cir. 1998); *Holmes v. California Army Nat. Guard*, 124 F.3d 1126 (9th Cir. 1997), *reh'g en banc denied*, 155 F.3d 1049 (9th Cir. 1998).

In September 2003, the Forum for Academic and Institutional Rights ("FAIR") (an association of certain law schools and law school faculties) and others brought this action against Secretary of Defense Donald R. Rumsfeld and other members of the President's administration (petitioners) in the United States District Court for the District of New Jersey, *FAIR* at 228, alleging, *inter alia*, that the Solomon Amendment violates the First Amendment rights of law schools. *FAIR* at 230. Respondents immediately applied for a temporary restraining order and moved for a preliminary injunction, both of which were denied by the District Court. *FAIR* at 228.

Applying the First Amendment standard of "intermediate scrutiny" for laws affecting expressive conduct, *see United States v. O'Brien*, 391 U.S. 367 (1968), the District Court held that the Solomon Amendment does not violate respondents' First Amendment rights. Pet. App. 161a-166a. The court found that the Solomon Amendment advances the important government interest in raising a volunteer military, *id.* at 162a-163a, that the military's recruitment effort would be less effective if its recruiters were denied equal access to campuses and their students, *id.* at 164a, and that the Solomon Amendment does not seek to suppress ideas. *Id.* at 165a-166a. The court emphasized that institutions are free to denounce the military's policies without risking the loss of federal funds. Id. at 166a.[6]

---

[6] The District Court refused to dismiss the complaint for lack of standing. The District Court held, on the basis of the allegations in the complaint, that a broad range of plaintiffs in addition to FAIR, including individual students and faculty members, student organizations at two law schools, and a national association of law professors, had standing to challenge the

(continued...)

A divided panel of the Court of Appeals for the Third Circuit reversed. *FAIR* at 246. The panel majority held that respondents were likely to prevail on their claim that the Solomon Amendment violates the First Amendment, and directed the District Court to issue a preliminary injunction against enforcement of the Solomon Amendment. *Id.* The Court of Appeals equated the Solomon Amendment's funding condition with a direct regulatory mandate that institutions afford military recruiters equal access to their campuses and students and found that it imposed a penalty for not doing so. *Id.* at 229 n.9 and 230.

The Third Circuit further held that the Solomon Amendment is subject to strict scrutiny under the First Amendment because it both directly burdens the right of educational institutions to engage in expressive association[7], *FAIR* at 234, and implicates the compelled speech doctrine because it forces laws schools to propagate, accommodate, and subsidize a message with which they disagree. *Id.* at 240. In the Third Circuit's view, the Solomon Amendment requires law schools to convey the message that all employers are equal, and to facilitate the military's statements that homosexual applicants may not serve. *Id.* at 239.

The Third Circuit held that the government had failed to establish that no less restrictive alternative means for effective

---

[6](...continued)
constitutionality of the Solomon Amendment. Pet. App. 84a86a, 103a-128a. Petitioners do not here challenge FAIR's standing. *See* Petition at 7, n.2.

[7] The court reasoned that the presence of military recruiters on campus would force law schools to send a message that they accept discrimination against homosexuals as a legitimate form of behavior. *Id.* at 232.

recruitment of military personnel existed, and suggested loan repayment programs and television and radio advertisements as two such alternatives. *FAIR* at 235

The Court of Appeals also concluded that respondents would be entitled to a preliminary injunction even if the *O'Brien* standard of "intermediate" (rather than strict) scrutiny were applicable. *FAIR* at 246. The court held that a denial of equal access to military recruiters involves expressive conduct, thereby requiring the government to prove that the Solomon Amendment enhances the military's recruitment effort in order to sustain its burden under *O'Brien*. *Id.* at 235.[8]

The government moved for a stay of mandate pending the filing of its *certiorari* petition. By order dated January 20, 2005, the Court of Appeals granted a stay and by order dated February 2, 2005 denied respondents' motion to reconsider the stay.

This Court granted *certiorari* on May 2, 2005.

SUMMARY OF ARGUMENT

Based upon centuries of collective experience, culminating in positions at the highest levels of military command, *amici* view a highly qualified, well-educated and effective officer corps as essential to the military's ability to fulfill its national security mission. Without the ability to recruit and train college and university educated individuals, the military cannot maintain the high quality of its officer corps. Recruiting educated men and women for its officer corps and enlisted ranks to further our

---

[8] Judge Aldisert dissented. *FAIR* at 246. He applied the *O'Brien* standard and concluded that the Solomon Amendment is constitutional. *Id.* at 261-262.

compelling government interest in an effective military is, therefore, essential.

In enacting the Solomon Amendment Congress made the express judgment that on-campus recruiting is essential to maintaining an all-volunteer force. That judgment should be accorded particular deference. Congress has unique expertise in the conduct of the national defense and military affairs and the judiciary has acknowledged that it does not. *Gilligan v. Morgan*, 413 U.S. 1 (1973). The Court of Appeals' suggestions as to possible alternatives to on-campus military recruiting are merely speculative, impractical, and contrary to universal industry practices. They also reveal a profound ignorance of the military's current efforts to attract qualified candidates in addition to on-campus recruiting.

The Court of Appeals also applied an entirely incorrect analysis in assessing the Solomon Amendment's constitutionality. Contrary to the Third Circuit's holding, the Solomon Amendment neither impairs an educational institution's right to expressive association, nor does it compel such an institution to convey any message with which the institution disagrees. In short, the Solomon Amendment simply does not implicate the First Amendment's guarantees of freedom of speech and association.

Finally, even if First Amendment concerns were implicated by the Solomon Amendment's conditioning of the receipt of federal funding on providing equal access to military recruiters, the statute easily passes the applicable intermediate scrutiny test because it furthers the substantial governmental interest in "raising a military."

ARGUMENT

I.

THE GOVERNMENT'S COMPELLING NATIONAL SECURITY INTEREST IN AN EDUCATED AND CAPABLE OFFICER CORPS REQUIRES THE ABILITY TO RECRUIT ON CAMPUS

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981), quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964). Without educated officers the military's ability to function effectively and fulfill its mission to defend the nation is seriously undermined. *Amici*'s vast experience with the all-volunteer force informs their firm belief that effective recruitment from the broadest pool of available talent is essential to staff an all-volunteer military. The Solomon Amendment was drafted and adopted with these tenets in mind, and reflects Congress' judgment that equal access to college and university campuses is a crucial component of effective military recruitment.

This case does not merely involve the usual deference accorded legislative determinations. It arises "in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Chappell v. Wallace*, 462 U.S. 296, 301 (1988). This Court has recognized that ". . . .the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline; and Congress and the courts have acted in conformity with that view." *Id.* at 300-301.

In contrast to Congress' broad constitutional power over military issues, this Court has acknowledged that the judiciary lacks competence with respect to these matters. "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *see also Rostker v. Goldberg*, 453 U.S. 57, 64-66 (1981); *Orloff v. Willoughby*, 345 U.S. 83, 93-94 n.5 (1953).

The Solomon Amendment rests on two strongly articulated judgments by the legislative branch. The first is that restrictions on military recruiting at colleges and universities interfere with "the Federal Government's constitutionally mandated function of raising a military." 141 Cong. Rec. 595 (1995) (Rep. Solomon).[9] The

---

[9] Representative Solomon explained during the debate on the floor of the House:

> **[R]ecruiting is the key to our all-volunteer military forces** . . . . Recruiters have been able to enlist such promising volunteers for our armed forces by going into high schools and colleges and informing young people of the increased opportunities that a military tour or career can provide. That is why we need this amendment.

142 Cong. Rec. 16,860 (1996) (emphasis added).

Representative Goodlatte concurred:

> "Campus recruiting is a **vitally important**

(continued...)

second is that equal access is critical to effective military recruiting.[10]

The House Committee report on the 2004 amendment specifically requires equal access:

> ....Our Nation's all volunteer armed services have been called upon to serve and they are performing their mission at the highest standard. The military's ability to perform at this standard can only be maintained with effective and uninhibited recruitment programs. Successful recruitment relies heavily upon the ability of military recruiters to have access to students on the campuses of colleges and universities that is equal to other employers.

H.R. Rep. No. 443, 108th Cong., 2d Sess. Pt. 1, at 3-4 (2004).

---

[9](...continued)
component of the military's effort to attract our Nation's best and brightest young people," and institutions that exclude military recruiters "interfere with the Federal Government's constitutionally mandated function of raising a military."

Id. at 12,712 (emphasis added).

[10] The text of the Solomon Amendment as originally enacted did not expressly refer to equal access. The Department of Defense interpreted the Act to condition federal funding on equal access and Congress amended the law in 2004 to ratify that interpretation. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811.

The primary sources for the nation's officer corps are the Reserve Officer Training Corps (ROTC)[11] (comprised of students enrolled at participating colleges and universities), the service academies, and college and university students who are not in ROTC programs. The military is particularly interested in those non-ROTC students who are pursuing advanced degrees in fields important to the military services, particularly law, medicine and engineering, where there is simply no alternative recruiting source other than universities.[12] Because of this reality, *amici*, as experienced military leaders, respectfully urge that the military simply cannot maintain the quality of its officer corps unless it retains its ability to recruit and train college and university-educated individuals.

The Third Circuit suggests that the military has real-world alternatives to on-campus recruiting of these high quality candidates, such as loan repayment programs and television and

---

[11] Colleges and universities are the principal source of our military leadership. The service academies combined supply only about 15 percent of officers in all services. ROTC programs alone produce approximately 60 percent of all officers in the U.S. Armed Forces and 75 percent of U.S. Army officers. The balance comes primarily from college and university students who are not in ROTC programs. Banning military recruiters from campus also affects recruiting for the reserves and the National Guard, force components that are vital in times of active conflict, such as the present campaigns in Afghanistan and Iraq.

[12] The military has no means of educating doctors or lawyers, and must instead rely on law schools and medical schools. While the service academies train engineers, pilots and other technical personnel, they cannot do so in nearly the numbers necessary to staff the nation's defense forces adequately.

radio advertisements, *FAIR* at 235.[13] This speculative suggestion is contrary to the universal practice in the human resources field. No amount of Defense spending on advertising would offset the loss of the ability to "go to the customer" – in this case the nation's students – if access equal to that given other prospective employers is denied.

The job recruitment process and the various factors that influence a potential recruit's decision are not essentially different for the armed forces than for private sector employers. All prospective employers need to have personal contact with the pool of talent. Major law firms and corporations find it essential to recruit on campus and devote hundreds of thousands of dollars and thousands of hours to that process. Denying equal access to military recruiters puts our armed forces at a serious – in many cases decisive – competitive disadvantage. Banning military recruiters from campus similarly affects recruiting for the reserves and the National Guard, force components that are vital in times of active conflict, such as the present campaigns in Afghanistan and Iraq. If alternatives imagined by the Third Circuit were effective

---

[13] Each of the branches of the military already commits significant resources and efforts on advertising on television, radio and print media, and they all devote significant human resources to other programs to increase the pool of qualified officer candidates and enlisted personnel. On average, the armed forces spends in excess of $1 billion a year on these programs, roughly split evenly between recruiting and advertising. *See* Department of Defense Budget at http://www.dod.mil/comptroller/defbudget/fy2006/ and the Appendix, which contains a summary chart showing military expenditures for recruitment and advertising in the past several fiscal years and excerpts from a Department of Defense public website containing the raw data on which the chart is based.

and sufficient, private employers would not devote substantial time or resources to on-campus recruiting.

In short, *amici* know of no practical and effective alternative to campus recruiting that can fulfill the military's and the nation's compelling need for a well-educated and highly trained officer corps of the highest quality to serve the country.

II.

THE COURT OF APPEALS' CONSTITUTIONAL ANALYSIS IS FUNDAMENTALLY FLAWED

The Court of Appeals incorrectly held that the Solomon Amendment implicates the First Amendment because it interferes with expressive association and compels speech.. The Solomon Amendment does neither, and the Third Circuit's entire First Amendment analysis is inapposite.

The equal access condition applies only if institutions ***voluntarily*** choose to receive the specified federal funding. Any institution is at liberty to forego this funding if it concludes that granting equal access to military recruiters "associates" that institution with a congressionally mandated policy with which it disagrees. Because the receipt of federal funds is not compulsory, and because no institution is compelled to provide access to potential employers, there is no compelled association.

The Solomon Amendment does not even force institutions that choose to accept federal funds to provide a minimum or predetermined level of access. Rather, it simply requires institutions to grant military recruiters the same access to their facilities and students as they give to other outside employers. Finally, the Solomon Amendment does not ask the institutions to

adopt any statements made by military recruiters as their own. [14] Institutions that voluntarily accept federal funding remain free to protest the military's policies as publicly and as vigorously as they wish and to make clear that they do not agree with those policies.

A. The Solomon Amendment Does Not Interfere with Expressive Association and Does Not Compel Speech.

The Court of Appeals held that the Solomon Amendment interferes with expressive association and compels speech, triggering the application of strict scrutiny under the First Amendment. The decision should be reversed, because both the threshold holding and the level of scrutiny applied by the Third Circuit were incorrect.

1. The Solomon Amendment Does Not Impair A School's Right to Expressive Association.

Relying on *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), the Court of Appeals held that the Solomon Amendment impairs a law school's right to expressive association. *FAIR* at 230. Reliance on *Dale*, which invalidated a state law that required the Boy Scouts to accept gay men as scout leaders, is misplaced for several reasons.

---

[14] Military recruiters do not seek access to campuses for the purpose of advocating discrimination against homosexuals. To the contrary, the "Don't ask, Don't tell" policy expressly prohibits military recruiters from discussing a potential recruit's sexual preferences. 10 U.S.C. § 654(d). Rather, the recruiters seek to promote service in the nation's military and to present information about the various options and benefits of such service.

First, unlike the law struck down in *Dale*, the Solomon Amendment does not burden a school's right to expressive association. In fact, the statute is entirely unconcerned with an institution's internal composition and organization.

Second, unlike the scout leader in *Dale*, military recruiters are not a part of the educational institution itself, and do not become so through their recruiting activities. The statute in *Dale* sought to impose substantive standards on the organization's personnel and leadership policies. In contrast, the role of recruiters is simply to attract students to service in the armed forces, an organization clearly separate and apart from the school. In this regard, the military recruiters are no different from law firm partners or corporate executives who recruit on campus. Once an institution has chosen to establish an on-campus recruiting process, the Solomon Amendment requires only that military recruiters be afforded access to that process equal to that given to representatives of other employers.

Third, unlike the New Jersey law at issue in *Dale*, the Solomon Amendment does not compel an institution to adopt or state, even implicitly, a position that is inconsistent with its underlying or fundamental beliefs. A scout leader's integral relationship with Boy Scouts and the Boy Scout organization could hardly be more different from a military recruiter's transient relationship with university students and the university. A scout leader is not only a permanent and integral official of the Boy Scout organization, but is the single most important role model who purports to speak for that organization, and has direct, frequent and personal contact with adolescent boys.

By contrast, visiting recruiters, whether working on behalf of military or civilian employers, speak only for the employers they represent. They do not purport to speak for the educational

institutions that they visit and no reasonable person would believe otherwise. It is apparent to students and the community that recruiters are "outsiders" on campus. Thus there is no serious risk that the laws and policies governing the armed forces could mistakenly be seen by students, faculty or the community as reflecting the views of the school.

No one would assume that a law school, for example, endorses any particular "message" that some might perceive to be inherent in the work performed by each of the many other prospective employers who visit the campus to recruit, including law firms, corporate legal departments, public interest groups that span the ideological spectrum, and civilian government agencies.[15] Indeed, such a notion is inherently illogical, because recruiting employers include a variety of entities, whose philosophical and political views (and those of their clients, executives, customers and officials) cover the entire ideological spectrum, espousing views that are either shared or rejected by different students or faculty members. Even if this were not so, any school wishing to ensure that faculty, students or the outside world will not mistakenly perceive that the institution endorses the policies or actions of the U.S. military (or other recruiting employers), would be free to publicize its disclaimers or express its disagreement with any policy or any recruiting organization.[16]

---

[15] It cannot seriously be argued , for example, that the law school or outside communities believe that positions taken by recruiting law firms in cases the firms litigate reflect the political or philosophical beliefs of the faculty, administration or student body.

[16] Unlike the youthful members of the Boy Scouts in *Dale*, university students and faculty are exceptionally mature, and

(continued...)

2. The Court of Appeals' Compelled Association Analysis Is Flawed.

The argument advanced by the Third Circuit that the Solomon Amendment impermissibly intrudes into an educational institution's freedom of association is likewise flawed because no educational institution has been compelled by virtue of the Solomon Amendment to do anything.

Schools that voluntarily choose to accept federal funds and to enter into grant agreements or contracts with the United States agree to numerous conditions. For example, a school cannot receive federal funds if it discriminates in hiring on the basis of race, gender or disability. Such conditions, particularly those that require a government contractor to abide by various laws, are commonplace and legal, and are often explicitly mandated by law. It simply does not follow that permitting military recruiters equal access can rationally be interpreted as a school's agreement with any governmental policy.

---

[16](...continued)
function in a setting in which ideas are vigorously debated, attacked and defended, and in which a respect for diverse views is supposedly encouraged. The university is peculiarly the "marketplace of ideas" (*Keyishian v. Board of Regents*, 385 U.S. 589 (1967)) and the free exchange of diverse viewpoints is supposed to be a fundamental element of their education. *See Healy v. James*, 408 U.S. 169 (1972). There is no reason to believe that the presence of military recruiters on campus threatens such an environment. To the contrary, the exclusion of military recruiters or others who do not espouse the views of certain university faculties or administrations constrains the "marketplace of ideas" in favor of a paternalistic notion that university students require protection from "dangerous ideas" or different and "unacceptable" viewpoints.

Schools wishing to distance themselves from statutory military policies and to send a clear message about what the faculty and administration think about such policies, have several options. They may decline government funding and publicize their reasons for doing so. They may allow equal access and publicize their disagreement with a particular policy. Or they may seek to change the law through the democratic process.

3. The Solomon Amendment Does Not Implicate the Compelled Speech Doctrine.

The compelled speech doctrine is triggered when the government compels a speaker to convey a message that is at odds with the speaker's beliefs. *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 470-471 (1997). The Solomon Amendment, however, does not compel any speech or action. It surely does not require law schools or universities to convey any particular message antagonistic to their beliefs.

As noted, if a school is concerned that the presence of military recruiters, among the many other employers visiting its campus, might mistakenly send any general or particular message that the school does not wish to convey – such as an implicit endorsement of the "Don't ask, Don't tell" policy that troubled the Third Circuit, *FAIR* at 239 – the school is free to communicate its views as strongly as it wishes and can do so easily by stating that it does not endorse the mandate of federal law or the military's adherence to it.[17] *See Pruneyard Shopping Ctr. v. Robins*, 447

---

[17] Even accepting, *arguendo*, the Court of Appeals' strained premise that military recruiters, solely by visiting the campus, cause law schools to make a "statement" that openly homosexual students

(continued...)

U.S. 74, 87 (1980) (compelled speech doctrine inapplicable where property is not reserved for personal use; views of speakers unlikely to be attributed to property owner, who can effectively correct any such incorrect impression through its own speech).

The Third Circuit's holding that law schools "object to conveying the message that all employers are equal," *FAIR* at 239, is particularly inexplicable. A law school that affords military recruiters equal access consistent with the Solomon Amendment conveys no such message. Indeed, "equal access" should convey nothing whatsoever about the institution's views about any employer. If anything, an inclusive on-campus job recruiting program conveys only the message that the law school treats the prospective employers equally, and is facilitating students' choice among a broad range of employment options available to students, without making any judgment about any particular employer.[18]

---

[17](...continued)
are ineligible for military service, *FAIR* at 239, such a statement would simply report an objective fact about the law and the congressionally mandated qualifications for military service. It would be nothing more or less than an accurate statement of the law. Summarizing legal requirements is hardly equivalent to endorsing those laws. Surely the law faculty would want the students to know what the law is. A law school could not perform its core function if its faculty were to refrain from discussing laws or court decisions that they deem unwise. Indeed, an essential part of law school education is the critical analysis of statutes, regulations and court decisions, and the open discussion of differing views of them. In fact, law faculty criticize existing law in virtually every class.

[18] Even assuming, hypothetically, that granting equal access to military recruiters conveys a message of any kind about the university's views or values, interpreting the university's action as
(continued...)

Even if the presence of military recruiters on campus were deemed to be speech, it would be "government speech," and this Court's recent decision ion *Johanns v. Livestock Marketing Board*, ___ U.S. ___, 125 S.Ct. 2055 (2005) would compel the conclusion that there is no First Amendment violation in requiring a school to facilitate such speech (""Compelled support of the government' is of course perfectly constitutional. . . ." ___ U.S. at ___, 125 S.Ct. at 2062 (citation omitted).

B. The Solomon Amendment is Valid Under "Intermediate Scrutiny" Standards.

The Court of Appeals held that even if the rights of expressive association and free speech were not implicated, the Solomon Amendment would be subject to review under the "intermediate scrutiny" standard for the regulation of expressive conduct set forth in *O'Brien*. The holding that the Solomon Amendment does not, on the existing record, satisfy *O'Brien*'s standard of "intermediate scrutiny," *FAIR* at 243-246, is simply wrong.

Indeed, in *O'Brien* this Court made it clear that it has "not accept[ed] the view than an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S. at 376.[19]

---

[18](...continued)
a desire for federal funding is as logical as viewing it as an endorsement the "Don't ask, Don't tell" law.

[19] Indeed, as this Court has held "[i]t is possible to find some kernel of expression in almost every activity a person undertakes – (continued...)

Even if granting or denying equal access to military recruiters from campus were sufficiently expressive to come within the scope of the First Amendment, regulation of conduct that imposes an incidental burden on expression is constitutional so long as it furthers a substantial governmental interest that is "unrelated to the suppression of free expression," *O'Brien*, 391 U.S. at 377, and that "would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985).

The government's compelling interest in recruiting qualified men and women for military service is entirely unrelated to the suppression of expression.

The Court of Appeals held that respondents are entitled to a preliminary injunction under *O'Brien* because the government did not present evidence in court to prove that the Solomon Amendment enhances military recruiting efforts. *FAIR* at 245. This was unnecessary because the decisions and actions of the educational institutions themselves amply demonstrate that on-campus recruiting is essential for effective recruiting by employers and for providing broad employment opportunities for students.

When the university itself allows recruiters to conduct on-campus interviews, provides interview facilities, makes employers' literature available in the placement office or elsewhere on campus, and offers recruiters assistance in scheduling interviews, the school is manifesting its own judgment that it is necessary and appropriate for employers to reach potential recruits in an effective manner. When the university denies those same

---

[19](...continued)
for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel of expression is not sufficient to bring the activity within the protection of the First Amendment." *See City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

opportunities to military recruiters, it is depriving the military of access that the university itself deems essential or important for effective recruiting. The educational institution's own actions thus furnish the evidentiary basis finding that access to campus is essential for effective recruiting, and that denial of that access undermines an essential aspect of raising a military. As senior military leaders with decades of experience in recruiting and training members of the armed forces, *amici* are certain that on-campus recruiting is essential to maintaining an effective all-volunteer military.

If on-campus recruitment were deemed unnecessary or ineffective, law schools and other university faculties or departments would not tolerate the administrative burden of administering a campus job recruiting program. Similarly, employers would not incur the significant costs incident to participating in the on-campus recruiting process if they did not deem such participation important in meeting their staffing needs.

To the extent anything beyond the schools' own decisions and common sense are required to confirm that equal access to campus recruiting for military recruiters is necessary, Congress has made that judgment in enacting the Solomon Amendment's funding condition. *See, e.g., Goldman v. Weinberger*, 475 U.S. 503, 509 (1986) (the government is not required, in response to Free Exercise Clause claim, to offer evidentiary support for challenged military dress regulations). As discussed in Point I, *supra*, that Congressional judgment is entitled to heightened deference.

CONCLUSION

The decision of the Court of Appeals should be reversed, and the case should be dismissed.

Respectfully submitted,

MARTIN S. KAUFMAN*
* *Counsel of Record*
Atlantic Legal Foundation
60 East 42nd Street
New York, NY 10165
(212) 867-3322
Counsel for Amici Curiae

Of Counsel:

JOE R. REEDER
PHILIP R. SELLINGER
JOHN P. EINWECHTER
Greenberg Traurig
800 Connecticut Ave. N.W.
Washington, DC 20006
(202) 331-3100

July 2005

APPENDIX

STATISTICAL INFORMATION ON MILITARY EXPENDITURES FOR RECRUITMENT AND ADVERTISING

Military Expenditures - Recruiting and Advertising

FY2001-FY2006 - Summary

RECRUTING

	FY 2001 Actual	FY 2002 Actual	FY 2003 Actual	FY 2004 Actual	FY 2005 Estimate	FY 2006 Estimate
Army	245.5	233.1	280.3	254	253.4	299.8
Navy	131.8	125.5	165.4	151.1	179.2	198.7
Marine Corps	62.9	63.2	69.9	67.8	64.7	70.4
Air Force	66.6	61.4	127.6	63.6	61.5	64.4
Army Reserve	48.2	40.6	42.6	38.9	35.6	30.9
Navy Reserve	20.4	18.1	14.5	16.3	N/A	N/A
Marine Corps Reserve	4.9	5.3	5.2	4.7	4.8	4.8
Air Force Reserve	6.1	6.5	7.3	7.2	5.3	5.3
Army National Guard	35.4	30.6	43.9	37.7	31.4	48.2
Air National Guard	3.4	4.5	4.5	4.1	3.6	3.7
Total	**625.2**	**588.8**	**761.2**	**645.4**	**639.5**	**726.2**

ADVERTISING

	FY 2001 Actual	FY 2002 Actual	FY 2003 Actual	FY 2004 Actual	FY 2005 Estimate	FY 2006 Estimate
Army	143.9	216.2	196.6	201.7	200.7	182.2
Navy	94.5	102.7	89.1	83	100.3	83.7
Marine Corps	46.1	47.1	44.5	45.7	47.5	45.1
Air Force	75.3	87.8	17.4	76	55.6	72.2
Defense-Wide	24	7.6	23.4	14.3	24.2	7.2
Army Reserve	35.5	48.3	50.8	63.2	54.7	57.5
Navy Reserve	4.2	6.5	7.9	7.5	N/A	N/A
Marine Corps Reserve	4.9	2.8	3	3.1	3.1	3.3
Air Force Reserve	9.5	11.9	21	12.5	9.1	10.5
Army National Guard	48.9	54.1	62.3	122.1	69.8	76.4
Air National Guard	16.1	10.9	18.8	16.2	5.7	5.8
Total	**502.9**	**595.9**	**534.8**	**645.3**	**570.7**	**543.9**

RECRUITING, ADVERTISING, AND EXAMINING

Overall funding in recruiting, advertising, and examining provides support for recruiting commands and stations throughout the United States; for local, regional, and national advertising to support the procurement and retention of quality enlisted and officer personnel; and for the U.S. Military Entrance Processing Command (MEPCOM), which includes the Military Entrance Processing Stations (MEPS) that process all enlisted personnel entering on active duty.

($ in Millions)

	FY 2002 Actual	Price Growth	Program Growth	FY 2003 Estimate	Price Growth	Program Growth	FY 2004 Estimate	Price Growth	Program Growth	FY 2005 Estimate
Army	525.6	+9.3	-3.4	531.5	+8.8	+11.0	551.3	+9.9	+5.2	566.4
Navy	228.2	+8.9	+8.8	245.9	+7.1	-1.6	251.4	+7.5	-4.0	254.9
Marine Corps	110.3	+2.1	+5.2	117.6	+1.8	-4.2	115.2	+2.0	-1.1	116.1
Air Force	151.6	+2.1	+0.4	154.1	+2.4	-2.7	153.8	+2.8	+3.7	160.3
Defense-Wide	7.6	+0.1	+18.0	25.7	+0.4	-18.4	7.7	+0.1	+0.3	8.1
Defense Health Program	31.2	+0.7	-	31.9	+0.8	-0.1	32.6	+0.9	-0.2	33.3
Army Reserve	88.9	+1.7	-0.5	90.0	+1.3	+11.4	102.7	+1.6	+3.3	107.6
Navy Reserve	24.6	+0.4	-2.4	22.6	+0.4	+1.7	24.7	+0.4	+0.3	25.4
Marine Corps Reserve	8.1	+0.1	-	8.2	+0.1	-0.1	8.2	+0.1	--	8.3
Air Force Reserve	18.4	+0.2	-0.1	18.5	+0.3	-4.6	14.2	+0.3	+0.1	14.6
Army National Guard	84.7	+1.2	+1.6	87.5	+1.4	+7.6	96.5	+1.6	-11.8	86.3
Air National Guard	15.4	+0.2	-5.9	9.7	+0.2	-0.2	9.7	+0.2	-0.2	9.7
Total	1,294.6	+27.0	+21.7	1,343.2	+25.0	-0.2	1,368.0	+27.4	-4.5	1,391.0

http://www.defenselink.mil/comptroller/defbudget/fy2004/fy2004_overview.pdf

RECRUITING, ADVERTISING, AND EXAMINING

RECRUITING

The recruiting funds provide support for recruiting commands and stations throughout the United States. Recruiting costs are for those items essential to the accomplishment of the recruiting mission, including meals, lodging, and travel of applicants; recruiter expenses, travel and per diem; civilian pay; vehicle operation and maintenance; lease of office space; and other incidental expenses necessary to support the recruiting mission. The FY 2004 Recruiting program reflects a net increase of $19.7 million. Of this amount, $14.4 million is for price growth and $5.3 million (0.8 percent) is for net program growth.
The following tables provide the funding by Component for each category.

RECRUITING

($ in Millions)

	FY 2002 Actual	Price Growth	Program Growth	FY 2003 Estimate	Price Growth	Program Growth	FY 2004 Estimate	Price Growth	Program Growth	FY 2005 Estimate
Army	233.1	+4.1	+17.7	254.9	+7.4	+2.9	265.2	+4.6	+4.5	274.3
Navy	125.5	+5.1	+8.3	138.9	+3.7	+0.8	143.4	+4.2	-4.1	143.5
Marine Corps	63.2	+1.3	+6.6	71.1	+1.1	-5.7	66.5	+1.1	-1.2	66.4
Air Force	61.4	+1.1	-1.9	60.6	+1.0	+3.3	64.9	+1.3	-0.1	66.1
Army Reserve	40.6	+0.8	-1.6	39.8	+0.6	-0.9	39.5	+0.7	+2.9	43.1
Navy Reserve	18.1	+0.3	-3.2	15.2	+0.3	+1.7	17.2	+0.3	+0.4	17.9
Marine Corps Reserve	5.3	+0.1	-0.1	5.3	+0.1	-0.1	5.3	+0.1	--	5.4
Air Force Reserve	6.5	--	-1.5	5.0	+0.1	--	5.1	+0.1	+0.2	5.4
Army National Guard	30.6	+0.5	+8.2	39.4	--	+3.6	43.0	+0.8	-0.1	43.7
Air National Guard	4.5	+0.1	-0.7	3.9	+0.1	-0.3	3.7	+0.1	-0.1	3.7
Total	588.8	+13.4	+31.8	634.1	+14.4	+5.3	653.8	+13.3	+2.4	669.5

A-3

RECRUITING, ADVERTISING, AND EXAMINING

ADVERTISING

The advertising funds provide for local, regional, and national advertising to support the procurement and retention of quality enlisted and officer personnel. All advertising is designed to increase public awareness, portray opportunities, and generate recruit leads. The Services fund a media mix of advertising that includes television and radio; magazines and newspapers; direct mail campaigns; and recruiting booklets, pamphlets, and posters. The Operation and Maintenance (O&M), Defense-Wide appropriation funds common services for the Active and Reserve Components to include providing consolidated lead lists and direct mail campaigns. The FY 2004 Advertising program reflects a net increase of $0.7 million. This amount reflects the net sum of $8.0 million for price growth, partially offset by a net program decrease of $7.3 million (-1.2 percent).

ADVERTISING

($ in Millions)

	FY 2002 Actual	Price Growth	Program Growth	FY 2003 Estimate	Price Growth	Program Growth	FY 2004 Estimate	Price Growth	Program Growth	FY 2005 Estimate
Army	216.2	+3.1	-22.4	196.9	-0.3	+6.2	202.8	+3.5	+3.0	209.3
Navy	102.7	+3.8	+0.5	107.0	+3.4	-2.4	108.0	+3.3	+0.1	111.4
Marine Corps	47.1	+0.8	-1.4	46.5	+0.7	+1.5	48.7	+0.9	+0.1	49.7
Air Force	87.8	+1.0	+1.7	90.5	+1.3	-6.0	85.8	+1.4	+4.1	91.3
Defense-Wide	7.6	+0.1	+18.0	25.7	+0.4	-18.4	7.7	+0.1	+0.2	8.1
Army Reserve	48.3	+0.9	+1.1	50.2	+0.7	+12.3	63.2	+0.9	+0.4	64.5
Navy Reserve	6.5	+0.1	+0.8	7.4	+0.1	--	7.5	+0.1	-0.1	7.5
Marine Corps Reserve	2.8	+0.1	--	2.9	--	--	2.9	--	--	2.9
Air Force Reserve	11.9	+0.2	+1.4	13.5	+0.2	-4.6	9.1	+0.1	--	9.2
Army National Guard	54.1	+0.7	-6.6	48.2	+1.4	+4.0	53.6	+0.8	-11.7	42.6
Air National Guard	10.9	+0.1	-5.2	5.8	+0.1	+0.1	6.0	+0.1	-0.1	6.0
Total	595.9	+10.9	-12.1	594.6	+8.0	-7.3	595.3	+11.2	-4.0	602.5

A-4

RECRUITING, ADVERTISING, AND EXAMINING

Overall funding in recruiting, advertising, and examining provides support for recruiting commands and stations throughout the United States for local, regional, and national advertising to access and retain quality enlisted and officer personnel. It provides for the U.S. Military Entrance Processing Command (MEPCOM), which includes the Military Entrance Processing Stations (MEPS) that process all enlisted personnel entering on active duty. Overall funding in recruiting, advertising, and examining increases from $1,338.1 million in FY 2004 to $1,395.6 million in FY 2005, which is a net increase of $57.5 million above the FY 2004 level. Of this amount, $24.4 million is for price growth and $33.1 million (2.5 percent) is for net program growth.

RECRUITING, ADVERTISING, AND EXAMINING
($ in Millions)

	FY 2003 Actual	Price Growth	Program Growth	FY 2004 Estimate	Price Growth	Program Growth	FY 2005 Estimate
Army	558.0	10.7	-26.1	542.6	8.0	41.8	592.4
Navy	254.5	9.4	-33.4	230.5	8.0	44.0	282.5
Marine Corps	114.4	1.7	-3.8	112.3	1.7	-	114.0
Air Force	147.7	3.3	-6.0	145.0	2.1	-0.4	146.7
Defense Health Program	34.3	0.9	-3.8	31.4	0.6	1.2	33.2
Defense-Wide	23.4	0.4	-9.2	14.6	0.1	4.0	18.7
Army Reserve	93.4	1.3	8.0	102.7	1.5	-13.9	90.3
Navy Reserve	22.4	0.4	0.9	23.7	0.4	-24.1	0.0
Marine Corps Reserve	8.2	0.1	-0.2	8.1	0.1	-0.2	8.0
Air Force Reserve	28.3	0.6	-14.6	14.1	0.2	0.3	14.6
Army National Guard	106.2	1.6	-4.3	103.5	1.6	-19.3	85.8
Air National Guard	23.3	0.4	-14.1	9.6	0.1	-0.3	9.4
Total	1,414.1	+30.6	-106.6	1,338.1	+24.4	+33.1	1,395.6

http://www.defenselink.mil/comptroller/defbudget/fy2005/fy2005_overview.pdf

RECRUITING, ADVERTISING, AND EXAMINING

The following tables provide the funding by Component for each category.

Recruiting

The recruiting mission is to maintain the highest quality force possible. The recruiting funds provide support for recruiting commands and stations throughout the United States. Recruiting costs are for those items essential to the accomplishment of the recruiting mission, including meals, lodging, and travel of applicants; recruiter expenses, travel and per diem; civilian pay; vehicle operation and maintenance; lease of office space; and other incidental expenses necessary to support the recruiting mission. The FY 2005 recruiting program reflects a net increase of $13.5 million. Of this amount, $7.1 million is for price growth and $6.4 million (1 percent) is for net program growth.

RECRUITING
($ in Millions)

	FY 2003 Actual	Price Growth	Program Growth	FY 2004 Estimate	Price Growth	Program Growth	FY 2005 Estimate
Army	280.3	+2.2	-24.2	258.3	+0.2	+2.1	260.6
Navy	165.4	+4.3	-22.2	147.5	+2.8	+31.4	181.7
Marine Corps	69.9	+1.1	-6.9	64.1	+1.1	-0.3	64.9
Air Force	127.6	+3.0	-69.5	61.1	+1.0	+0.9	63.0
Army Reserve	42.6	+0.5	-3.6	39.5	+0.6	-3.1	37.0
Navy Reserve	14.5	+0.3	+1.5	16.3	+0.3	-16.6	0.0
Marine Corps Reserve	5.2	-	-0.2	5.0	+0.1	-0.2	4.9
Air Force Reserve	7.3	+0.2	-2.4	5.1	+0.1	+0.2	5.4
Army National Guard	43.9	+0.7	+5.8	50.4	+0.8	-7.8	43.4
Air National Guard	4.5	+0.1	-0.9	3.7	+0.1	-0.2	3.6
Total	761.2	+12.4	-122.6	651.0	+7.1	+6.4	664.5

A-6

Advertising

The advertising funds provide for local, regional, national and corporate advertising to access quality enlisted and officer personnel. All advertising is designed to increase public awareness and describe employment opportunities. The Services fund a media mix of advertising that includes television and radio; magazines and newspapers; internet websites and banner advertising; informational videos; direct mail campaigns; and recruiting booklets, pamphlets, and posters. The Operation and Maintenance (O&M), Defense-Wide appropriation funds a joint program managed by the Defense Human Resources Field Activity. This program consists of a corporate campaign for joint service recruiting and advertising, market research and studies, and survey requirements for the Active and Reserve Components. This joint funding is used for consolidated lead lists, direct mail campaigns, youth and adult influencer public opinion polls, and Selective Service System direct market mailings. The FY 2005 Advertising program reflects a net decrease of $7.3 million. This amount is the net sum of $14.9 million for price growth and a $22.2 million (3.8 percent) net program decrease.

ADVERTISING
($ in Millions)

	FY 2003 Actual	Price Growth	Program Growth	FY 2004 Estimate	Price Growth	Program Growth	FY 2005 Estimate
Army	196.6	+5.9	-	202.5	+6.1	-8.0	200.6
Navy	89.1	+5.1	-11.2	83.0	+5.2	+12.6	100.8
Marine Corps	44.5	+0.6	+3.1	48.2	+0.6	+0.3	49.1
Air Force	17.4	+0.2	+63.1	80.7	+1.0	-1.3	80.4
Defense-Wide	23.4	+0.4	-9.2	14.6	+0.1	+4.0	18.7
Army Reserve	50.8	+0.8	+11.6	63.2	+0.9	-10.8	53.3
Navy Reserve	7.9	+0.1	-0.6	7.4	+0.1	-7.5	0.0
Marine Corps Reserve	3.0	+0.1	-	3.1	-	-	3.1
Air Force Reserve	21.0	+0.2	-12.2	9.0	+0.1	+0.1	9.2
Army National Guard	62.3	+0.9	-10.1	53.1	+0.8	-11.5	42.4
Air National Guard	18.8	+0.3	-13.2	5.9	-	-0.1	5.8
Total	534.8	+14.6	+21.3	570.7	+14.9	-22.2	563.4

RECRUITING, ADVERTISING, AND EXAMINING

Overall funding in recruiting, advertising, and examining provides support for recruiting commands and stations throughout the United States for local, regional, and national advertising to access and retain quality enlisted and officer personnel. It provides for the U.S. Military Entrance Processing Command (MEPCOM), which includes the Military Entrance Processing Stations (MEPS) that process all enlisted personnel entering on active duty. Overall funding in recruiting, advertising, and examining increases from $1,375.7 million in FY 2005 to $1,433.1 million in FY 2006, which is a net increase of $57.4 million above the FY 2005 level. Of this amount, $28.9 million is for price growth and $28.5 million (2.1 percent) is for net program growth.

RECRUITING, ADVERTISING, AND EXAMINING
($ in Millions)

	FY 2004 Actual	Price Change	Program Change	FY 2005 Estimate	Price Change	Program Change	FY 2006 Estimate
Army	561.5	+11.1	+10.7	583.3	+11.6	+9.0	603.9
Navy	234.1	+5.9	+39.5	279.5	+6.4	-3.5	282.4
Marine Corps	113.5	+0.4	-1.7	112.2	+2.3	+1.0	115.5
Air Force	142.1	+2.9	-24.8	120.2	+2.7	+17.1	140.0
Defense Health Program	32.3	+0.8	+0.1	33.2	+0.8	+3.7	37.7
Defense-Wide	14.3	+0.3	+9.6	24.2	+0.5	-17.5	7.2
Army Reserve	102.1	+1.8	-13.6	90.3	+1.8	-3.7	88.4
Navy Reserve	23.8	-	-	-	-	-	-
Marine Corps Reserve	7.8	+0.1	-	7.9	+0.2	-	8.1
Air Force Reserve	19.7	+0.4	-5.7	14.4	+0.3	+1.1	15.8
Army National Guard	159.8	+3.2	-61.8	101.2	+2.1	+21.3	124.6
Air National Guard	20.3	+0.4	-11.4	9.3	+0.2	-	9.5
Total	1,431.3	+27.3	-59.1	1,375.7	+28.9	+28.5	1,433.1

http://www.defenselink.mil/comptroller/defbudget/fy2006/fy2006_overview.pdf

RECRUITING, ADVERTISING, AND EXAMINING

The following tables provide the funding by Component for each category.

Recruiting

The recruiting mission is to maintain the highest quality force possible. The recruiting funds provide support for recruiting commands and stations throughout the United States. Recruiting costs are for those items essential to the accomplishment of the recruiting mission, including meals, lodging, and travel of applicants; recruiter expenses, travel and per diem; civilian pay; vehicle operation and maintenance; lease of office space; and other incidental expenses necessary to support the recruiting mission. The FY 2006 recruiting program reflects a net increase of $86.7 million. Of this amount, $13.6 million is for price growth and $73.1 million (11.4 percent) is for net program growth.

RECRUITING
($ in Millions)

	FY 2004 Actual	Price Change	Program Change	FY 2005 Estimate	Price Change	Program Change	FY 2006 Estimate
Army	254.0	+4.4	-5.0	253.4	+5.0	+41.4	299.8
Navy	151.1	+4.2	+23.9	179.2	+4.3	+15.2	198.7
Marine Corps	67.8	+0.2	-3.3	64.7	+1.3	+4.4	70.4
Air Force	63.6	+1.3	-3.4	61.5	+1.4	+1.5	64.4
Army Reserve	38.9	+0.7	-4.0	35.6	+0.7	-5.4	30.9
Navy Reserve	16.3	-	-	-	-	-	-
Marine Corps Reserve	4.7	+0.1	-	4.8	-	-	4.8
Air Force Reserve	7.2	+0.2	-2.1	5.3	+0.1	-0.1	5.3
Army National Guard	37.7	+0.8	-7.1	31.4	+0.7	+16.1	48.2
Air National Guard	4.1	+0.1	-0.6	3.6	+0.1	-	3.7
Total	645.4	+12.0	-1.6	639.5	+13.6	+73.1	726.2

A-9

RECRUITING, ADVERTISING, AND EXAMINING

Advertising

The advertising funds provide for local, regional, national and corporate advertising to access quality enlisted and officer personnel. All advertising is designed to increase public awareness and describe employment opportunities. The Services fund a media mix of advertising that includes television and radio; magazines and newspapers; internet websites and banner advertising; informational videos; direct mail campaigns; and recruiting booklets, pamphlets, and posters. The Operation and Maintenance (O&M), Defense-Wide appropriation funds a joint program managed by the Defense Human Resources Activity. This program consists of a corporate campaign for joint service recruiting and advertising, market research and studies, and survey requirements for the Active and Reserve Components. This joint funding is used for consolidated lead lists, direct mail campaigns, youth and adult influencer public opinion polls, and Selective Service System direct market mailings. The FY 2006 Advertising program reflects a net decrease of $26.8 million. This amount is the net sum of $11.8 million for price growth and a $38.6 million (6.8 percent) net program decrease.

ADVERTISING
($ in Millions)

	FY 2004 Actual	Price Change	Program Change	FY 2005 Estimate	Price Change	Program Change	FY 2006 Estimate
Army	201.7	+3.5	-4.5	200.7	+4.0	-22.5	182.2
Navy	83.0	+1.7	+15.6	100.3	+2.1	-18.7	83.7
Marine Corps	45.7	+0.2	+1.6	47.5	+1.0	-3.4	45.1
Air Force	76.0	+1.5	-21.9	55.6	+1.2	+15.4	72.2
Defense-Wide	14.3	+0.3	+9.6	24.2	+0.5	-17.5	7.2
Army Reserve	63.2	+1.1	-9.6	54.7	+1.1	+1.7	57.5
Navy Reserve	7.5	-	-	-	-	-	-
Marine Corps Reserve	3.1	-	-	3.1	+0.2	-	3.3
Air Force Reserve	12.5	+0.2	-3.6	9.1	+0.2	+1.2	10.5
Army National Guard	122.1	+2.4	-54.7	69.8	+1.4	+5.2	76.4
Air National Guard	16.2	+0.3	-10.8	5.7	+0.1	-	5.8
Total	645.3	+11.2	-78.3	570.7	+11.8	-38.6	543.9